



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**
Mitt Romney, Governor ♦ Jane Wallis Gumble, Director

**Guidance for Interpreting the Most Recent Changes to the
Housing Appeals Committee Regulations**

760 CMR 30.00: PROCEDURAL REGULATIONS OF THE HOUSING APPEALS COMMITTEE

- I. 760 CMR 30.02 (Definitions) is amended by inserting after the first sentence of the definition of low or moderate income housing :-

Low or moderate-income housing shall include housing subsidized by the federal or state government to provide long-term housing for individuals who are mentally ill or mentally retarded.

760 CMR 30.00: HOUSING APPEALS COMMITTEE: CRITERIA FOR DECISIONS UNDER M.G.L. c. 40B, §§ 20 THROUGH 23

- I. 760 CMR 31.01 is amended by striking Subsection (2) and substituting the following Subsection (2):-

(2) Fundability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency as follows:

- (a) A determination of Project Eligibility (Site Approval) shall include:
 - (i) the name and address of the applicant
 - (ii) the address of the site and site description;
 - (iii) the number and type (ownership or rental) of housing units proposed;
 - (iv) the name of the housing program under which Project Eligibility (Site Approval) is sought; and
 - (v) relevant details of the particular project if not mandated by the housing program (including percentage of units for low or moderate income households, income eligibility standards, the duration of restrictions requiring low or moderate income housing, and the limited dividend status of the developer).
- (b) A determination of Project Eligibility (Site Approval) shall make the following findings:
 - (i) that the proposed project appears generally eligible under the requirements of the housing program, subject to final review of eligibility and to final approval,
 - (ii) that the subsidizing agency has performed an on-site inspection of the site and has reviewed pertinent information submitted by the applicant,

- (iii) that the proposed housing design is generally appropriate for the site on which it is located;
 - (iv) that the proposed project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
 - (v) that an initial pro forma has been reviewed and the project appears financially feasible on the basis of estimated development costs;
 - (vi) that the developer meets the general eligibility standards of the housing program.
- (c) Within ten days of filing of its application with a subsidizing agency for preliminary approval of a project, the applicant shall serve written notice upon the Director of the Department of Housing and Community Development, One Congress Street, 10th Floor, Boston, MA 02114.
 - (d) Upon receipt of the application, the subsidizing agency shall provide written notice to the chief elected official of the involved community and a thirty-day review period for comments, and it shall consider any such comments prior to issuing a determination of Project Eligibility (Site Approval).
 - (e) Within ten days of receipt of a written determination of Project Eligibility (Site Approval) from the subsidizing agency, the applicant shall serve a copy of that determination upon the Director of the Department of Housing and Community Development, One Congress Street, 10th Floor, Boston, MA 02114.
 - (f) After issuance of a determination of Project Eligibility (Site Approval), the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy.

Project Eligibility (Site Approval) Letters which are *issued to a developer after September 1, 2001 must comply with the above requirements.*

II. 760 CMR 31.04 is amended by striking the last sentence in paragraph (1)(a) and by substituting the following sentences:-

Housing units shall be counted if they are subject to building permits, available for occupancy, or occupied. In addition, housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued. No housing unit shall be counted more than once.

Units authorized by a comprehensive permit are counted for purposes of the subsidized housing inventory on ***August 31, 2001***.

- **Example:** A comprehensive permit for 100 rental units issued by the ZBA became final on **April 15, 2001**. The 100 rental units authorized by the comprehensive permit are added to the community's subsidized housing inventory when the regulation is promulgated on **August 31, 2001**. If the building permit is not issued for the project by **April 14, 2002**, the units are removed from the subsidized housing inventory.
- **Example:** A comprehensive permit for 100 units issued by the ZBA became final on **April 15, 2001**. The 100 units authorized by the comprehensive permit are added to the community's subsidized housing inventory when the regulation is promulgated on **August 31, 2001**. A building permit is issued on any date from the present time until **April 14, 2002**. The units remain on the subsidized housing inventory from **September 1, 2001 until the affordability restrictions expire or until the building permit expires for failure to produce the units**.
- **Note:** This regulation could be critical in 2 scenarios. If the addition of these units would place the community over the 10% threshold, the ZBA may deny a comprehensive permit (and its decision will be upheld by the Housing Appeals Committee) until the subsidized housing inventory falls below 10% because a building permit is not issued within one year, or other units are removed from the subsidized housing inventory due to expiring use restrictions. Additionally, if the units authorized by the comprehensive permit would increase the affordable housing stock by a number of units equal to 2% of the total housing stock pursuant to 760 CMR 31.07 (1)(d), the ZBA could invoke the "recent progress" provision and deny subsequent CP applications for one year until the units were removed from the subsidized housing inventory due to failure to obtain a building permit within one year.

III. 760 CMR 31.07 is amended by striking the first sentence in subsection (1) and by substituting the following:-

Presumptions. Paragraphs (a), (b), (c), (e), and (f) of this subsection shall be rebuttable presumptions; paragraphs (d), (g), and (h) of this subsection shall be irrebuttable presumptions.

IV. 760 CMR 31.07 is amended by striking paragraph (1)(d) and by substituting the following paragraph (1)(d):-

(d) Recent progress toward housing unit minimum - A decision by a Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if the municipality has made recent progress toward its housing unit minimum. Recent progress toward its housing unit minimum shall mean that the number of housing units that have been created during the twelve months prior to the date of the comprehensive permit application and that count toward the housing unit minimum described in 760 CMR 31.04(1) is equal to or greater than 2% of the municipality's total housing units. Such a denial shall not preclude refiling of the application at a later date.

This provision applies to comprehensive permit (CP) applications which are filed on or after September 1, 2001.

- **Example:** Developer A files a CP application on August 1, 2001. Community, (which had 1,000 total housing units as of August 1, 2000), completed construction of, and issued certificates of occupancy for 20 affordable units during the spring of 2001. The ZBA reviews the application and denies the CP during September 2001 on the basis that the denial is consistent with local needs since it has made "recent progress" pursuant to 760 CMR 31.07 (1)(d). ***The denial will not be upheld by the Housing Appeals Committee.*** The application was made prior to the effective date of September 1, 2001, and therefore, the "recent progress" provision does not apply.
- **Example:** Developer B files a CP application on September 4, 2001. Community, (which had 1,000 total housing units as of September 4, 2001), produced 20 affordable units for which certificates of occupancy were issued on April 30, 2001. The ZBA reviews the application and denies the CP during September 2001. The application was made after the effective date of September 1, 2001; Community has made "recent progress" towards its housing minimum, and therefore, the denial will be deemed "consistent with local needs," and the denial will be upheld by the Housing Appeals Committee. **If no additional affordable housing units are added to Community's subsidized housing inventory between May 1, 2001 and April 30, 2002, Developer B may submit a CP application on May 1, 2002, at the earliest.**

V. 760 CMR 31.07 is amended by adding the following paragraph (1)(g):-

(g) Large scale project - A decision by the Board to deny a comprehensive permit application or grant a permit with conditions shall be consistent with local needs if:

- (i) in a municipality which has a total number of 7500 or more housing units as enumerated in the latest available United States Census, the application for a comprehensive permit involved construction of more than 300 housing units or a number of housing units equal to 2% of all housing units in the municipality, whichever number is greater; or
- (ii) in a municipality which has between 5,000 and 7,500 housing units exclusive, as so enumerated, the application for a comprehensive permit involved construction of more than 250 housing units; or
- (iii) in a municipality which has between 2,500 and 5,000 housing units inclusive, as so enumerated, the application for a comprehensive permit involved construction of more than 200 housing units; or
- (iv) in a municipality which has less than 2,500 housing units, as so enumerated, the application for a comprehensive permit involved construction of more than 150 housing units.

This provision applies to comprehensive permit (CP) applications which are filed on or after September 1, 2001.

- **Example:** On September 4, Developer files a CP application in Community, (which contained 1,000 total housing units as of September 1, 2001) which would result in the production of 160 units. The ZBA reviews the application and denies the CP on the grounds that the denial is consistent with local needs since the project's scale is too large for the community, pursuant to 760 CMR 31.07 (1)(g). ***The decision will be upheld by the Housing Appeals Committee.***
- **Example:** On August 31, 2001, Developer files a CP application in Community, (which contained 10,000 total housing units at the time of application) which would result in the production of 301 units. On September 4, 2001, the ZBA reviews the application and denies the CP on the grounds that the denial is consistent with local needs since the project's scale is too large for the community, pursuant to 760 CMR 31.07 (1)(g). ***The decision will not be upheld by the Housing Appeals Committee.*** Because the application was made on August 31, 2001, and the "large scale project" provisions of 760 CMR 31.07 (1)(g) apply only to applications made after August 31, 2001, the affirmative defense established by the regulation may not be invoked.
- **Note:** Communities which approve a CP application (which was filed after September 1, 2001) which contains units at the cap for "large scale projects," may invoke the "recent progress" provision and may deny comprehensive permit applications for one year.
- It should be noted that this regulation does not preclude a community from formulating an agreement with a developer (or granting a CP with conditions) to "phase in" a larger scale project (even one which exceeds the cap established in the regulation) over a period of years. Rather, this regulation establishes an affirmative defense to large-scale comprehensive permit projects which could threaten a community's resources when built in a short period of time. The department encourages communities and developers to collaborate and plan to achieve affordable housing goals, while being mindful of the existing capacity and needs of the community.

VI. 760 CMR 31.07 is amended by adding the following paragraph (1)(h):-

(h) Related applications - A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if twelve months has not elapsed between the date of application and any of the following:

- (i) the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing,
- (ii) any date during which such an application was pending before a local permit granting authority,
- (iii) the date of disposition of such an application, or
- (iv) the date of withdrawal of such an application.

An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

This provision applies to comprehensive permit (CP) applications which are filed on or after September 1, 2001.

- **Example:** On December 2, 2000, Developer applied for a special permit to build a large-scale retail establishment on Site A in Community. Community denied the permit on January 5, 2001. Developer spent some months considering alternate uses of Site A. On August 31, 2001 Developer files a CP application to develop affordable housing on Site A in Community. The ZBA reviews the application and denies the CP on the grounds that the denial is consistent with local need since twelve months have not elapsed between the date the special permit application was denied and the comprehensive permit application was filed, pursuant to 760 CMR 31.07 (1)(g)(iii). ***The denial will not be upheld by the Housing Appeals Committee.*** The “related application” regulation cited applies only to comprehensive permit applications filed after September 1, 2001.
- **Example:** On December 2, 2000, Developer applied for a special permit to build a large-scale retail establishment on Site A in Community. Community denied the permit on January 5, 2001. Developer spent some months considering alternate uses of Site A. On September 4, 2001 Developer files a CP application to develop affordable housing on Site A in Community. The ZBA reviews the application and denies the CP on the grounds that the denial is consistent with local need since twelve months have not elapsed between the date the special permit application was denied and the comprehensive permit application was filed, pursuant to 760 CMR 31.07 (1)(g)(iii). ***The denial will be upheld by the Housing Appeals Committee.*** Developer may not file a comprehensive permit application for Site A within Community until January 4, 2002.

VII. 760 CMR 31.10 is stricken and the following is substituted in its place:

31.10: Effective Date of Amendments

Subsections 760 CMR 31.07(1)(d), 31.07(1)(g), and 31.07(1)(h) shall apply to all applications for comprehensive permits filed after August 31, 2001.